

UNIVERSITÄT DES SAARLANDES

Vorträge, Reden und Berichte aus dem Europa-Institut / Nr. 28

herausgegeben

von Professor Dr. Dr. Georg RESS
und Professor Dr. Michael R. WILL

JORGE BARRERA GRAF

COMMERCIAL LAW IN MEXICO

— origins, features, reform —

1984

EUROPA-INSTITUT

Vorträge, Reden und Berichte aus dem Europa-Institut / Nr. 28

herausgegeben

**von Professor Dr. Dr. Georg RESS
und Professor Dr. Michael R. WILL**

Lic. Jorge BARRERA GRAF

Investigador del Instituto de Investigaciones

Jurídicas en la Universidad Nacional

Autónoma de México y Profesor

numerario de derecho mercantil.

Membre du Conseil de Direction de l'Institut

international pour l'unification du droit privé

COMMERCIAL LAW IN MEXICO

— origins, features, reform —

Vortrag vor dem Europa-Institut der Universität des Saarlandes

Saarbrücken, 10. Mai 1983

Before entering into the subject, it is interesting to note that in spite of the geographical proximity of my country to the U.S.A., and also in spite of the huge and important economic, social and cultural relations we have had with that country, the American legal system and the principles of the Common Law have not influenced our legal structure very much and that the models taken from that country are few. The most relevant in private law is the institution of the trust which was adopted by Mexico where it has developed in a rapid and irrestrictive manner.

1.

Mexico is organized as a Federal Republic like Germany and the U.S.A., the latter being the one from which we copied our constitutional framework and some constitutional principles. There are 32 States and a Federal District where the City of Mexico is located. Our Federal Constitution provides that all matters not expressly reserved by it to the Federal Government must be considered within the sovereignty of the States. Among these reserved powers, the regulation of commerce (taking this term in its broadest meaning, i.e. trade and industrial transactions) is vested in the government of the Union. This means that all commercial relations are regulated on the Federal level, whereas civil matters

falling within the competence of the States are contained in each of the 33 Civil Codes. The same applies to civil and commercial laws of procedure.

2.

There are of course close relations between these two branches of private law. Civil norms are considered as general or common regarding their sphere of application, i.e. applicable to all kinds of persons - natural or moral - whereas commercial provisions apply to merchants and economic and juridical undertakings or enterprises, and also to certain things or objects imposing the same character on the agreements and relations in which they constitute their object matter ... Such are the cases of vessels and of negotiable instruments: transactions such as the sales of shares of stock and the issue, acceptance, endorsement of bills, notes or cheques are mercantile for this reason alone.

3.

Mexican commercial legislation comprises the Code of Commerce and several special laws which have been passed during the last fifty years. As for the Code, the one which is currently in force was promulgated almost one century ago. It came into force on January 1st, 1890. Before that text, since the Independence from Spain in 1821,

we had other Commercial Codes, one in 1854, and the second in 1884. At the time of their enactment, the three Codes included all commercial matters, and all commercial legislation, and no other mercantile law existed in those days. This is, or at least this was, the nature and the concept of a Code, and also of the doctrine of codification during the last century, starting with the famous Cinq Codes de Napoléon.

4.

Our present Code, as well as its predecessors, is based on, and in many instances copies the French Code of Commerce of 1808. Most of the institutions to be regulated either directly followed that model or were indirectly influenced by the Italian and Spanish codes of 1882 and 1885, respectively. Now, since these models were also based on French law, it is obvious that many principles and legal institutions of our system have a venerable age of 175 years.

It is natural then that in view of the age of our commercial principles and institutions, modern legislation had to be drafted in order to incorporate and regulate new and pertinent solutions to many problems and economic demands into our system. Several of those new laws derogated or cancelled important chapters and sections of our code, whereas other matters which did not form part of the text of 1890 caused the promulgation of new statutory laws.

5.

During the Thirties, the movement towards the modernisation of our commercial system began. Special laws were passed for those matters which required modern legislation. Such was the case with regard to negotiable instruments, companies of commercial nature, banking and insurance institutions and contract, bankruptcy and maritime transportation.

6.

The Law of Negotiable Instruments and Credit Operations, in force since 1932, covers, as its name indicates, both, documents such as bills, notes, cheques, debentures, warrants, warehouse receipts, and also banking operations. Among the latter the Anglo-Saxon institution of the trust was incorporated into our legal system, with the difference that in Mexico the trustee has to be a banking institution, namely a fiduciary bank. The regulation of bills, notes and cheques followed with minor modifications the Geneva Convention of 1930 and 1931. This law is one of the few which do not require substantial amendments in the part dealing with the above documents. This is not true for its second part which is devoted to credit operations, the regulation of which is incomplete and obsolete.

7.

As for commercial companies, our General Law of Commercial Companies was promulgated in 1934, around the time of the famous German law of 1932. However, the principles of the German law did not influence ours. American corporate law - mainly the law of the State of New York - was followed, with changes, in relation to certain matters, such as the non-value shares of stock, treasury stock, and more important, the personal liability imposed upon the manager, director or to the shareholders who commit illicit acts or perform unlawful activities on behalf of the corporation. The doctrine of ultra vires was also taken into consideration, if not by the law, by doctrine and jurisprudence.

8.

As for banking companies, the present General Law of Credit Institutions and Auxiliary Organizations has been in force since 1942. Under that law all banking companies, until their nationalization, had to be organized as stock corporations and had to be controlled, as were the National Banks, by the Ministry of Finance and by a special official agency, the National Banking and Insurance Commission. Five classes of private banks are still governed by that law: deposits and savings, capitalization, mortgages, financing and fiduciary institutions. Official or National Banks are ruled by specific laws, and that is also the case for the central bank, Banco de México.

All private banks - with two exceptions, the Labour Bank and a foreign branch of the National City Bank (the only foreign bank which has always been allowed) - were nationalized and expropriated on 1st September, 1982. A new regulation is being drafted in order to organize the new public entities, not as stock corporations but as similar bodies, in which the State will own the capital and control the activities. Up to now, there have been several claims in the Federal courts alleging the violation of constitutional principles by the expropriation and requesting prompt and fair payment for the assets which were affected by the decree.

9.

Insurance matters are regulated by two laws, one regarding companies (which have to be corporations), and the other regarding contracts of insurance. All kinds of risks can be covered by private insurances in Mexico, except those derived from labour relations which are subject to social security legislation: personal risks against illness, accidents, death; incapacity and risks regarding goods, property and rights, even liability arising from torts and litigation. These laws together with the one regarding negotiable instruments have operated well and do not require important amendments.

10.

There are other statutes regulating matters which were also included in the Code of Commerce, such as maritime navigation and bankruptcy. The law of bankruptcy has become ineffective and urgently needs essential changes. Several drafts on that matter have been prepared in the past, proposing mainly structural changes regarding the trustee or syndic (síndico) of the estate, but official circles have not given any encouragement towards a new law. On the other hand, we are now facing the worst economic crisis which has ever occurred, with severe recession, heavy devaluation, enormous foreign debt and increasing unemployment, factors which all have to be considered in order to prepare a completely revised version of that law. The interests of creditors, national and foreign, must be considered carefully and at the same time the survival of many insolvent enterprises which are not able to pay or which could only pay with discounts and delays must be taken into account. It is necessary to avoid or try to avoid their closing and liquidation.

11.

In view of so many matters which have been derogated from the Code of Commerce by new laws, the question arises as to what commercial activities remain regulated in that law. There are few, but they are still of great importance: First, the legal concept of merchants, physical or moral persons, and the enumeration and regulation of their duties: accounting and registry,

among the most important. Second, the list of the so-called "acts of commerce", i.e. commercial transactions and commercial enterprises. That list is wide (Article 75 contains 23 paragraphs, and some of them refer to different items), and yet, it is not exhaustive, because other laws add more acts of commerce to the list, such as the law of mining, the law of oil, and also the law of negotiable instruments. Besides, the last paragraph of Art. 75 expressly considers as other acts of commerce those similar to the ones enumerated.

Third, the Code still regulates operations different from credit or banking contracts (which, as stated before, are included in the second part of the Law of Negotiable Instruments and Credit Operations). Sales, certain loans and deposits, inland transportation from part of the old text. Finally, commercial procedure is also included in the Code of Commerce. Private procedural matters in Mexico are ruled by civil and mercantile laws, the former being reserved to local legislation, so that there are also 32 Codes of Civil Procedure.

12.

In addition to the derogatory laws, others have been enacted for matters that were not included in the Code, but which are of great importance because they were inspired by nationalistic and collective purposes. The most significant of them deal with foreign investments, consumer law, transfer of technology, patents, trade marks

and trade names. New projects are now being prepared in order to cover situations not yet regulated, such as unfair competition, trade restrictions, proper and efficient supply of essential consumer goods, and the regulation of public enterprises trying to impose rules of conduct and efficiency upon them.

13.

In order to end this superficial analysis of our commercial legal system let me refer to a topic which perhaps interests you more than those of a predominantly internal nature. I mean the regulation of foreign investments.

Restrictions in that field have a long tradition in Mexico and have been permanent and old: Since the promulgation of the present Mexico Constitution in 1917, and even before, at the end of the last century when railroads were nationalized. We have to consider that our Magna Carta came into existence as the result of a revolution, which completely transformed the social and economic structure of the country, and which took place during the second decade of this century.

In addition to the most important principles of our present Constitution, i.e. the provisions regarding agrarian matters which led to the confiscation of rural estates and their distribution among peasants, and the regulation of labour relations (arts. 27 and 123, respectively), the Constitution introduced limitations upon investments and acquisition of rural property by foreigners, and

as a reaction against the intervention of foreign governments trying to protect the interests of their subjects in Mexico, the Constitution established a principle with some tradition in Latin America, i.e. the so-called Calvo Clause, which provides that whenever a foreigner requests the protection of his national government against legal decisions taken in Mexico, he might lose his rights in favour of the Nation.

But apart from this rather romantic principle which, naturally, has never been recognized abroad, frequent limitations on industrial activities, which the government has considered to be of great importance, have been introduced since the time of the war (1941), and not by statutory law, but by administrative resolutions. Now, by reason of the fact that this kind of regulation is contrary to our legal system which does not vest in the Executive the right to dictate such restrictions, and since the Supreme Court had declared some of these limitations invalid and unconstitutional, the government prepared the Law of Foreign Investments and submitted it to Congress in 1973.

It limits the right of foreigners to buy or subscribe to capital stock and assets of enterprises, already operating or to be organized, and considers (and prohibits) as a form of foreign investment the fact that persons who are not Mexicans could obtain the control of those enterprises by any means whatsoever.

Besides, the Law grants broad discretionary powers to a special agency of the government, the National Commission of Foreign Investments, to increase or reduce the legal limits of participation of foreign interests.

Through this mechanism which has been criticized as being contrary to the correct concept of discretionary power of the Administration, that Agency has permitted and even promoted new and important foreign investments.

14.

With reference to new trends in the commercial law in Mexico, I must say that the traditional idea of enacting a new code covering of not all, at least the most important matters of that field, still prevails. Several projects have been drafted during the last years, without success so far of being discussed and approved. A new draft is being circulated and is now receiving criticisms and comments. In my opinion, the text is defective insofar as it does not include juridical institutions which are already in use, such as leasing and factoring in contracts; certain new negotiable instruments; new types of corporations; and because the regulation of traditional institutions such as the sales contract, maritime and air transportation, agency etc. ignores recent progresses not only in foreign law, but also in international conventions and rules, such as the 1980 Vienna Convention on Sales, the 1978 Hamburg Convention of Transportation, the Incoterms, the Rules of Vienna on letters of credit.

We hope that the outcome of this movement toward a new Code of Commerce as well as the contrasting opinions of scholars, judges, lawyers and associations will result in a text containing the majority of commercial matters. Others, which are subject to constant changes, such as consumer law and restrictions on foreign investments should remain governed by special and particular laws. New institutions and solutions adopted in other more advanced legal systems, in the United States, in France or in Germany, might be considered and transplanted as regards for instance holding and investment companies, personal liability of managers, disregard of legal entity, problems of groups of companies, trusts and monopolies, etc.

Discussions and analysis of the present project, and in general, the drafting of a new Code, must take into consideration two questions which are becoming more and more important, one of them being the growing intervention of the State in commercial activities, the other the economic provisions of our constitution which also have a tendency to be extended. These two questions taken together seem to indicate that within the same field of economic activities a new branch of the law is emerging, namely the Law of Economics, of a more public than private nature, because instead of regulating personal and individual interests it is aimed at protecting social rights: consumer law, regulation of supply, cooperative legislation are a few of this trend.

The intervention of the State in industry and commerce is going on through official administrative agencies and commissions, but mainly via companies organized as public share corporations, comprising enterprises controlled by the government even if it only holds minority shares. Obviously these essential problems will also have to be considered for future legislation.

EL INSTITUTO EUROPA DE LA UNIVERSIDAD DEL SARRE

El objetivo del Instituto Europa es la formación de graduados universitarios en todas las áreas de desarrollo de las Comunidades Europeas, con el fin de permitir al egresado el dominio de la disciplina del derecho europeo o lo prepare para integrar el cuadro de funcionarios de las instituciones comunitarias.

Este Instituto, único en su género en Alemania, depende de la Facultad de Derecho de la Universidad del Sarre, aunque posee un programa de estudios autónomo así como una organización y un cuerpo docente propio. Este último está compuesto por especialistas en todas las áreas de la integración, que desde la cátedra o desde las propias instituciones comunitarias, se han hecho acreedores de un reconocido prestigio.

ORGANIZACION DE LOS ESTUDIOS

El Certificado de Estudios Europeos que otorga el Instituto con la finalización exitosa del curso de estudios, testimonia haber aprobado tanto los llamados estudios básicos, como los electivos, así como dos seminarios y el conocimiento de tres idiomas europeos incluido el alemán.

Para aquellos estudiantes que necesiten previamente perfeccionar sus nociones de alemán, la Universidad cuenta con un Colegio de Estudios que ofrece un curso intensivo según las diferentes condiciones y necesidades.

Los "estudios básicos" se orientan en cuatro direcciones: derecho material europeo y comunitario, derecho de las instituciones europeas, economía y política europea.

Los "estudios electivos" se dividen en materias jurídicas y no jurídicas.

Para la obtención del Certificado, los estudiantes deben aprobar una cantidad de materias que equivalgan a seis horas de derecho material, seis horas de derecho institucional, tres de economía y tres de política, haciendo un total de dieciocho horas para el curso básico. Para los estudios electivos el total de horas necesario es catorce, de las que solo seis podrán ser jurídicas. La equivalencia de una hora significa que durante el semestre correspondiente se dicta por lo menos una hora semanal de clase de dicha materia.

La realización del curso exige por tanto, un trabajo intensivo y la concurrencia a clases por lo menos cuatro horas por día durante los dos semestres que importa el curso.

Los estudios se ven complementados con un extenso programa de excursiones especialmente a las sedes de las instituciones comunitarias, seminarios de fines de semana, coloquios y conferencias.

ADMISION, BECAS, GASTOS DE ESTUDIO

El aspirante a ser admitido debe ser titular de un diploma universitario alemán o extranjero, así como de una constancia que acredite conocimientos suficientes del idioma alemán.

Las becas de estudio se gestionan directamente ante las embajadas alemanas en los países respectivos, las que en general, requieren una carta del Instituto que acredite la aceptación del estudiante por lo que en este sentido, resulta indispensable el envío anticipado de un curriculum vitae al Instituto. Hay además becas privadas que otorgan los partidos políticos alemanes así como las congregaciones religiosas.

Los gastos de estudio aún en caso de ausencia de una beca, son muy reducidos, pudiéndose estimar aproximadamente en ciento cincuenta dólares mensuales, los que incluyen alojamiento, manutención y transporte.

Las solicitudes de admisión deben remitirse antes del 15 de septiembre, comenzando los cursos por regla general en la última semana de octubre.

BIBLIOTECAS

El Instituto Europa cuenta con una muy completa biblioteca en varios idiomas sobre el tema de especialidad, la que ha sido designada como "depositaria" de las Comunidades Europeas, lo que significa la recepción inmediata y automática de toda la producción legislativa y doctrinaria de las mismas.

Existen además secciones dedicadas a los derechos humanos, impuestos, derecho africano y la integración en América Latina.

La Universidad cuenta con un conjunto de Bibliotecas para cada una de las diferentes materias de la carrera de abogacía y de economía. La Biblioteca Central de la Universidad, con más de un millón de volúmenes pone además a disposición del estudiante el sistema de pedidos a distancia que vincula a todas las Universidades alemanas lo que significa poner al alcance del interesado, todo lo que se publica en el mundo.

OTRAS ACTIVIDADES

El Instituto es además centro de numerosas conferencias que luego el mismo publica.

La Universidad ofrece una amplia gama de actividades deportivas, culturales y de esparcimiento.

El campus cuenta con numerosas cafeterías, restaurantes, un supermercado, Bancos, Correos, Imprenta y fotocopiadore, una discoteca, salas de fiesta y asadores al aire libre etc.

Todo está dispuesto para facilitar los estudios, hacer la vida universitaria muy llevadera y simplificar al máximo las dificultades.